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In The

Supreme Court of the United States

October Term, 1983

JOHN C. HARDEN,

Petitioner,

vs.

E. I. DuPONT DE NEMOURS & CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. RODMAN STEELE, JR.
STEELE, GOULD & FRIED
Attorneys for Petitioner
3232 IVB Building
1700 Market Street
Philadelphia, Pennsylvania 19103
(215) 563-8020

Of Counsel:
ROBERT TAYLOR
WAY, WAY & TAYLOR
115 East Wildwood Avenue
Wildwood, New Jersey 08260

9109

Ink Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587
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QUESTIONS PRESENTED

1. Whether the District Court repudiated federal policy and the constitutional mandate of Article I, Section 8 to promote the progress of science and the useful arts by refusing to consider the subsequent issuance of a patent as "an intervening fact" having legal and continuing commercial consequences material and necessary to a decision in applying a contractual statute of limitations against a bonus request, from a date prior to patent issue.

2. Whether inducing a potential inventor to assign all future patent rights to an employer as a precondition of employment and in consideration for benefits under an illusory invention bonus system contravenes the constitutional mandate of Article I, Section 8 to promote the progress of science and the useful arts and defeat the intent of Congress to enhance technological innovation in the United States.

3. Whether the termination of an employee inventor in retaliation for assertion of patent rights contravenes a clear public policy to promote the progress of science and the useful arts in accordance with Article I, Section 8 of the Constitution and supports a cause of action for wrongful discharge.

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E. I. DuPONT DE NEMOURS & CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The above-named petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered on May 12, 1983, affirming the opinion of the United States District Court for the District of New Jersey, Honorable Brotman, J., granting respondent's motion for summary judgment.

OPINIONS BELOW

The only opinions rendered by the District Court were on pretrial motions for summary judgment by respondent; these

opinions, not reported by instruction of the District Court, are set forth in the appendix to this petition. The Court of Appeals entered a judgment order without opinion; its order affirming the orders of the District Court is likewise set forth in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 12, 1983. A timely petition for rehearing en banc was denied by the Court of Appeals on June 7, 1983. This petition for writ of certiorari was filed within ninety days of June 7, 1983. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 8.

> The Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

STATEMENT OF THE CASE

Petitioner, John Harden, was employed as a laboratory technician and technologist by respondent, E.I. DuPont de Nemours and Company (DuPont) starting in 1942. For more than 35 years, and continuously except for military service, he provided electronic support for Ph.D. research chemists. John Harden signed away all future patent rights to DuPont in 1952 as a precondition of his continued employment. In return, DuPont promised to reward unusual accomplishment through a valuable suggestion award program and a bonus system.

John Harden's ideas, inventions and patents have thus far earned hundreds of millions of dollars for DuPont. John Harden received one one-thousand dollar valuable suggestion award. After so many years of valuable service, John Harden was considered for a bonus (in 1977) and was turned down, being advised that his patents were never used.[1] John Harden then requested that the patents be assigned back to him. Shortly thereafter, John Harden was forced to resign in retaliation for his request, being threatened with loss of pension benefits. Effectively, he was fired. Ph.D. chemists with whom John Harden worked, also named co-inventors, received bonus awards.

Although John Harden was not college-educated, he acquired a wealth of practical electronic experience over the years as he assisted chemists with no electronic background whatsoever. Among the many patents issued to DuPont prior to 1970 in which John Harden is a named co-inventor are two[2] directed to Differential Thermal Analysis. John Harden was also the first to make a concrete written suggestion that DuPont enter the field of manufacturing and selling analytical instruments. This business has proved immensely profitable, and was the basis for the one valuable suggestion award.

Requests for bonus awards must be submitted by one's supervisors under the DuPont system. Although DuPont purports to have properly considered and rejected such awards for John Harden in 1968, 1970 and 1977, the requests through 1970 were actually deferred and withdrawn, pending further commercial development of the inventions in question. Notwithstanding John Harden's assertion that the requests were deferred and withdrawn

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1. In fact, DuPont still marks products with patent numbers corresponding to John Harden's inventions.

2. U.S. Patent Nos. 3,117,438 and 3,283,560.

rather than refused, the District Court determined that John Harden's cause of action accrued when DuPont refused the first request for a bonus, and in any event no later than 1970. The District Court also determined that "no intervening fact occurred that would have given Harden any right to a bonus in 1977 that he did not possess in 1970."

The most important of the Differential Thermal Analysis patents[3] did not issue until 1971. DuPont will benefit directly from this patent, extending its preeminence in the field of analytical instruments, until the patent expires in 1988. Unfortunately for John Harden, this patent, and its legal and commercial consequences, have been deemed of no significance by the District Court. The result is unfair, even cruel, but very nearly inevitable under the "no win" rules applied by DuPont, and most other large companies.

John Harden, like most other employee-inventors, is at great risk in seeking a bonus. If he seeks a bonus too soon, there is insufficient commercial development to justify even a token award. If the request is made too late, employers such as DuPont can hide behind a statute of limitations ranging from 3 to 6 years.[4] Moreover, the time of submission is out of the employee's hands; only his supervisors could properly make the request. Finally, as the *coup de grace,* DuPont's bonus system is not governed only by the brief one-page outline shown to employees before assigning all their rights, but by a book of secret regulations over 30 pages in length; "discovered" much to DuPont's chagrin, and still subject to a protective order.

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3. U.S. Patent No. 3,554,002.

4. John Harden's supervisors counselled this course, quite successfully from DuPont's point of view.

John Harden's cause of action for DuPont's failure to properly consider his necessarily indirect requests has been held time-barred by the District Court as a matter of law. John Harden's cause of action for retaliatory termination of employment has been held not to state a cause of action as a matter of law, and such retaliatory termination not contrary to public policy. John Harden is not merely a victim of DuPont, but a thoroughly non-responsive body of law, applied by the District Court without regard to the concern for inventors as expressed in the constitutional mandate of Article I, Section 8 to promote science and the useful arts.

REASONS FOR GRANTING THE WRIT

The existence of a strong public interest in stimulating invention is evidenced by the creation of the patent system and the huge program of government support for scientific research. Securing incentives for individual inventors is necessary and fundamental to provide the stimulus to invent and to promote societal interests. However, corporate practice of requiring inventors to preassign their rights has substantially frustrated the purposes of the patent system in that the employed inventor is not guaranteed a reward proportional to his contribution. Failure to deal with this issue now is equivalent to ignoring the constitutional mandate "to promote the progress of science and useful arts," U.S. Const., Art. I, Sec. 8, at a time when there is clear recognition that technological advance is requisite to our economic well-being. It is time for the courts to recognize that employees are people who have everyday anxieties about holding their jobs and who have everyday expectations of being compensated for extraordinary service in developing practical, profitable inventions for their employers.

The growth of the American economy is tied to technical innovation. Statements of this premise appear daily in all forms

of communicative media. Recognition of the importance of scientific advancement to the economy is virtually without challenge. Congress has for years allotted significant sums of money to scientific research and development. Foremost among the reasons supporting such expenditures is the relationship between technological development and economic prosperity. Indeed, the framers of the Constitution, realizing that secrecy among craftsmen of their technical processes was not conducive to the establishment of a strong and advancing economy, gave Congress the power to grant patents to inventors in return for public disclosure of their inventions. Even though the concept of a monopoly was abhorrent to the early colonists, the founding fathers were willing to extend to inventors exclusive property rights in their inventions, for a limited period of time, in order to promote technological and consequently economic development.

Within the innovation process, the individual inventor plays the pivotal role. Massive expenditures of capital are meaningless without the existence of an individual who makes the creative contribution which is the essential ingredient to every invention. Brains, not dollars, create inventions. The importance of the inventor to technological innovation has been recognized at least nominally by Congress. Under current patent law, all patents must issue in the names of the inventors or they will be otherwise invalid. 35 U.S.C. §102(f). Also, the Constitution refers specifically to the securing of exclusive rights to *inventors*. U.S. Const., Art. I, Sec. 8.

Patent assignment data supports the proposition that most inventions are created by inventors in an employment situation. Various sources suggest that 70% to 80% of all patents are issued in the names of inventors employed by others.[5] Herein lies a basic

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5. Stedman, *The Employed Inventor: Issues, but no Answers*, 1 Am. Pat. L. Ass'n Q.J. 144 (1972).

problem in that under the current patent system the incentive to invent or disclose inventions is minimal for those who play the most significant part in technological development.

Ninety-five percent of the professional engineers and scientists are salaried employees of industrial enterprises or of the government.[6] Nearly all of these individuals are required as a condition of employment to assign all their future patent rights to their employers. The employed inventor derives little or no direct benefit from the patent system. This dilemma was pointed out by Admiral Rickover when he addressed the Sub-Committee on Patents, Trademarks and Copyrights in the 87th Congress:

> [O]ne of the two major problems facing the patent system is how to increase incentives for employed inventors who get no benefit whatever out of the patent system as it has evolved. We might well consider whether we ought not to go back to the original intent of the Constitution and devise some reward for inventors whether they are government or industry employees.

The lack of incentives manifests itself in the declining rate of United States technological innovation. The United States ranks fifth in the number of patents issued on a per capita basis. The National Science Board in its Report to Congress noted that the United States has a declining "patent balance," *i.e.*, the number of patents issued for American inventions over the number of patents based on foreign research. It has also been reported that the United States is falling behind some of the other countries in the number of inventions produced for the dollars invested.

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6. Lassagne, *The Legal Rights of Employed Inventors*, 51 A.B.A.J. 835 (1965).

Implicit in the United States constitutional provision giving Congress the power to grant patents and copyrights to inventors and authors is the concept of an opportunity for the inventor himself to earn a reward proportionate to the value of his invention in the marketplace. It has been repeatedly stated that the purpose of the patent system established under Article I, Sec. 8, cl. 8, is to reward the inventor and that the reward should be directed to the inventor. *Diamond v. Chakrabarty,* 447 U.S. 303, 307 (1980); *Kewanee Oil Co. v. Bicron Corp.,* 416 U.S. 470, 480 (1974); *Goldstein v. California* 412 U.S. 546, 555 (1973); *Mazer v. Stein,* 347 U.S. 201, 219 (1954); *Blanchard v. Sprague,* 3 F. Cas. 518, 650 (1839).

In commenting upon the economic philosophy behind the clause empowering Congress to grant patents and copyrights, this Court has recognized that inventors deserve rewards for disclosing their inventions.

> [E]ncouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in Science and Useful Arts. Sacrificial days devoted to such creative activities *deserve rewards commensurate with the services rendered.* [Emphasis added.]

Mazer, supra, at 219.

As the *Chakrabarty* Court has noted:

> The patent laws promote progress by offering inventors exclusive rights for a limited period as an incentive for their inventiveness and research efforts. *Kewanee Oil Co. v. Bicron Corp.,* 416 U.S. 470, 480-481, 181 USPQ 673, 678 (1974); *Universal*

> *Oil Co. v. Globe Co.*, 322 U.S. 471 484, 61 USPQ 382, 388 (1944). The authority of Congress is exercised in the hope that '[t]he productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy, and the emanations by way of increased employment and better lives for our citizens.' *Kewanne*, supra, at 480, 181 USPQ at 678.

Chakrabarty, supra, at 307. An inherent purpose of establishing a patent system is to give the inventor the reward to which he is entitled, but the employed inventor of today often times finds himself situated "out in the cold". Having been required as a condition of employment to assign any and all of his rights in all future patents or inventions to his employer, he reaps no reward nor is he in a position to effectively demand any reward. The corporate practice of requiring inventors to preassign their rights has substantially frustrated the purposes of the patent system in that the employed inventor is not guaranteed a reward proportional to his contribution. When an inventor has no prospect of receiving such a reward, he is less inclined to vigorously pursue a creative solution when presented with a problem, and is more likely to put forth an effort commensurate only to his salaried compensation. Unless an employer is bound by enforceable legal obligations pursuant to its employment contracts, there is virtually no chance for the employees to receive more than nominal rewards, corporate budgets being established in the manner that they are.

The patent system was not intended simply to induce investors to put their money into the development of inventions. The securing of monopolies to investors is not a legitimate object of the congressional enactment of the Patent Act. This Court has said that construing a patent to reward the assignee (employer)

> . . . gives . . . remuneration to parties that have no particular claims upon the government or the public, and it takes from those who have . . . Congress had not at all in view protection to assignees. . . Their condition in dealing in the subject of the invention, whether successful or otherwise, was not in the mind of that body, nor can any good reason be given why it should have been.

Wilson v. Rousseau, 45 U.S. 646, 678 (1846). "Since *Pennock v. Dialogue* was decided in 1829, this Court has consistently held that the primary purpose of our patent laws is not the creation of private fortunes for the owners of patents. . . ." *Motion Picture Patents Co. v. Universal Film Mfg. Co.,* 243 U.S. 502, 510-11 (1917).

The reward must be directed to the individual inventor in order to achieve the constitutional objective. The Constitution provides for limited rights *to the inventor.* U.S. Const., Art. I, Sec. 8. No mention is made of his professional association, his family, his eldest son, or his employer. The patent system was intended by the framers of the Constitution to encourage and reward the individual inventor.

In the United States, the inventor is the owner of the invention in the first instance. Contrast the situation of employed inventors in the United States with countries having high rates of innovation, *e.g.,* West Germany, Japan and Switzerland. These countries have public laws which statutorily *guarantee* incentives in the form of compensation to employed inventors.[7] Determination of an

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7. For example, in Japan, as to inventions within the employer's field, the employee-inventor is entitled to reasonable remuneration, the amount of which is determined with reference to the employer's profit from the invention. *Manual Industrial Property,* Octrooibureau Los en Stigter, 1982.

adequate incentive is a matter of *strong* public policy; far too important to be left to the whims of the employer whether corporate, institutional or governmental. The Netherlands, Austria, Sweden and Japan have taken the approach that the employed inventor's rights must be protected as a matter of public law in order to promote the goal of stimulating innovation.[8] The significance of the employed inventor's role is recognized, and his legal rights are addressed by a special, particularized body of law. Under these legal systems the employed inventor is entitled to compensation beyond salary for his inventions, and the inventor's right to remuneration is guaranteed by statutory remedies. Until now, in the United States, the same legal relationships are regulated primarily by the principles of general contract law. The vulnerability to abuse of the employed inventor and the special need to safeguard the incentive that promotes public interests, unfortunately, are not being taken into consideration by a purely contractual approach.

The current approach of leaving inventor rewards to employer/inventor contracts is inadequate. It does not reflect the constitutional standard or mandate "To Promote the progress of science and useful arts." General contract law is not sensitive to the need for a strong federal policy protecting the employed inventor in order to further public interests. Employment contracts between the inventor and his employer are not entered into by parties able to deal with each other at arms-length. The bargaining position of the employer is much stronger than that of the inventor. Agreements to assign all future patents are invariably a condition of employment for all technical personnel. Issues of patent assignment and a right to special compensation for inventions are non-negotiable for all practical purposes, thus removing the

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8. *See* Neumeyer, *Employees' Rights in Their Inventions*, 44 J.P.O.S. 674 (1962).

incentives that are inherent to the patent system and the underlying reason for its establishment.

This Court, in *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969), has already recognized that the principles of contract law are not always adequate to deal with contracts involving patents and the rights thereunder. In eliminating the doctrine of licensee estoppel, the Court stated, "We think it plain that the technical requirements of the contract doctrine must give way before the demands of the public interest in the typical situation involving the negotiation of a license after a patent has issued." *Lear, supra*, at 670-671. Contract law governing employee patent preassignment agreements merits analogous examination by the Court.

The employee inventor/employer relationship cannot be characterized as merely a simple contract question. The superior bargaining power of the employer and lack of alternative employment negate the employed inventor's "freedom of contract." In agreeing to assign future patents, the inventor is signing away any expectancy of a right to an exclusive, though time-limited property right in his or her invention—a right of significant economic importance, although not realized as such—at the time of signing. And, the American legal system does not guarantee the employed inventor even a modicum of protection. Mere "continuation of employment" has been deemed to be adequate consideration for the demand that the inventor agree to assign his patent to the employer. *Buckingham Products Co. v. McAleer Mfg. Co.*, 108 F.2d 192 (6 Cir. 1940); *Hebbard v. American Zinc, Lead & Smelting Co.*, 161 F.2d 339 (8 Cir. 1947). If the employee refuses to agree, American jurisprudence does not protect him from being fired. American technicians, engineers and scientists have no alternative but to relinquish their valuable patent rights to the employer. They literally have no bargaining power with respect to this issue.

The potential for abuse is staggering. Thousands of students graduate each year from our colleges and universities with engineering and science degrees. In order to secure employment, they must agree to preassign their patents. Their only real alternative is to change professions. This is highly undesirable, both to the individual and to society. Only the employer profits by being able to demand with impunity that the employee preassign his rights to what may in effect become a limited monopoly, no matter what the quantum of the employer's contribution to securing the patent is.

It is time for the courts to recognize that employees are people with ordinary anxieties about holding their jobs and with the ordinary expectations of compensation for extraordinary service in the form of a practical, profitable invention.[9]

Viewed from the standpoint of protecting the constitutional objectives to promote science and the useful arts, there is no justification for an employment agreement that preassigns potential rights of extreme value for a pittance. How can general contract law logically be construed to sustain an agreement when the subject matter (a new invention) is not even known at the time the inventor must sign the agreement? Federal patent policy should promote the progress of science and the useful arts. Contract law, if applied, must be interpreted and applied to serve this policy.

John Harden's case illustrates the extent to which an employer may take advantage of its position. In order to continue to work, Harden was told by his supervisors in 1952 that he must agree to assign any future patents to DuPont. DuPont further induced Harden to preassign his patents by representing to him that he

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9. Koenig, *The Shop Right — Time for Limitation*, 49 J.P.O.S. 658, 675 (1967).

would receive bonuses for special contributions to the company. After receiving patents for some, though not yet all, of the inventions relating to thermal analysis (about 1968-1970), Harden's supervisor requested bonus consideration. However, DuPont induced Harden to continue working for the company, thereby securing rights to more inventions by promising larger bonuses if such requests were deferred. Nevertheless, the District Court held that these employer representations, fully documented by deposition testimony, were not effective to toll a contractual statute of limitations.

In 1977 DuPont unequivocally refused a deferred request for a bonus made on behalf of Harden, this time saying that the patents had never been used; which was proved in discovery to be completely untrue. Mr. Harden brought suit soon thereafter; only to be told that his suit was time-barred because the breach of contract, in the opinion of the District Court, occurred many years earlier. In fact, according to the District Court, the breach occurred even before the most important of the Harden patents issues and before the phenomenal commercial success by DuPont upon which any award should have legitimately been based. If the statute of limitations or the equitable doctrine of laches can properly be invoked under such facts, then the entire DuPont Bonus Program, and most other plans, is a sham. If contract law does not protect America's future, federal policy must.

This is not the first time this Court has been asked to consider the employee inventor/employer relationship, and this Court has previously recognized that the relationship between the employee inventor and his employer merits special consideration. The concept of a "shop right" belonging to the employer was defined by this Court in *United States v. Dubilier Condenser Corp.*, 289 U.S. 178 (1933). The shop right gives the employer, in the absence of an agreement, the right to practice and use an invention developed by an employee using his employer's time and facilities.

In 1933, in *Dubilier,* the Supreme Court found it necessary to protect the corporate employer by the "shop right" concept, and the judicial doctrine of shop right was born out of need to protect the corporate employer. It is no longer 1933. The twentieth century has witnessed significant changes in socioeconomic values. Businesses have evolved from small and medium size firms to gigantic corporations in which ownership is separate from management. Formerly there was a clear delineation between employers, who frequently were owners of their own businesses, and employees. The employer in the old sense has been replaced by a superior in the corporate hierarchy who is himself an employee. *Pierce v. Ortho Pharmaceutical Corp.,* 84 N.J. 58, 66 (1980).

The Harden facts vividly point out how easy it is for the rights of the corporate inventor to be usurped by a corporate employer. The pendulum has swung. It is now the corporate employee, not the corporate employer of *Dubilier* who needs the United States Supreme Court's attention.

Congressional concern for the national importance of the patent system is evidenced by the recent creation of the Court of Appeals for the Federal Circuit. Unfortunately, due to jurisdiction requirements, John Harden's case cannot be heard by the country's most patent-sensitive court. John Harden is not alone; ninety-five percent of professional engineers are salaried employees. It is astoundingly clear that the United States Supreme Court must speak out on the employee issues raised herein. The need is compelling.

One must carefully focus on Harden's chronological sequence of events to realize the devastating effect of the statute of limitations, as applied by the District Court, on an inventor's chances of ever receiving fair recompense from his corporate employer. While Harden's inventive efforts occurred in the early

1960's, his most important patent did not even issue until 1971 and successful large scale commercialization did not occur until well into the 1970's. To hold that Harden was time-barred by a statute of limitations[10] that through contorted reasoning began to run, "at the latest in 1970", before the most important events that could give Harden a right to a bonus occurred, is to deprive him of even the most fundamental rights. This conclusion allows the law of contract to completely thwart the federal patent system and its constitutional underpinnings, even in a case where the employee, like Harden, was supposed to be "protected" by an incentive award contract.

The District Court held that no "intervening fact occurred that would have given Harden any right to a bonus in 1977 that he did not possess in 1970". By completely ignoring the issuance of the single most important Harden Patent, (the one that has enabled DuPont to effectively monopolize the differential thermal analysis equipment market, a multi-million dollar operation), the District Court has ignored the significance of the entire federal patent system and certainly the constitutional mandate of Article I, Section 8, "To promote science and the useful arts."

In this matter, the court held that the issuance of a commercially valuable patent is not sufficiently important to give John Harden the right to further consideration under DuPont's ambiguous bonus plan. In the context of summary judgment the holding is much broader in scope and onerous in effect. Now, the subsequent issuance of a commercially valuable patent need never, as a matter of law, be considered under such a bonus plan.

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10. The District Court made no reference to an actual point in time and completely ignored Harden's arguments of the disputed material facts as to whether the bonus request was rejected or withdrawn, and if rejected whether it was by an authorized person under the DuPont Plan and whether there was proper finality as required under the DuPont plan.

One must conclude that the District Court has completely discounted any value which Harden's patent may have to DuPont. Yet, it is this patent on its differential thermal analysis equipment that has deterred other companies from the field.

The District Court repudiated federal patent policy and any significance of the patent system by holding that Harden was time-barred under a Delaware (or New Jersey, the result is the same) six year contractual statute of limitations from seeking redress against DuPont. Not only was the bonus request which tolled the statute of limitations prematurely made by Harden's supervisor (and not by Harden, himself) in the 1968-1970 era, but as pointed out previously, it was made prior to the issuance by the U.S. Patent Office of the most important patent. The 17-year patent life had not even commenced at the time the request for bonus was made.

Considering that a company in the position of DuPont has a 17-year monopoly granted by federal law to exclusively capitalize on an invention like Harden's, and considering further that by their bonus agreements they promise award bonuses based on success during that period, it is unthinkable that Harden should be precluded from pursuing his legal remedies by application of a six-year statute of limitations. Such an application fails to recognize the reality of 17-year patent terms and the number of years needed to commercially develop an invention. The Court must also consider the manner in which a statute of limitations and DuPont's bonus program can be easily manipulated to deny the employee inventor's rights.

Harden's agreement with DuPont does not expressly require that he make his request for a bonus in view of any applicable statute of limitations. If the agreement is interpreted to include such a requirement, it is clearly a sham. Employees such as Harden can be taken advantage of with the greatest of ease.

Under the facts of this case, it is further unfathomable that the District Court could hold, as affirmed by the Third Circuit, that there is no public policy to protect an employee from unwarranted firing in *retaliation* by the employer against that employee for *merely seeking* due recompense for his inventions. One must conclude that the innovative "cream of the crop" have less rights in the United States than virtually any minority group in this country today.

Once again, the constitutional mandate "to promote science and the useful arts" has been completely ignored by the District Court. In fact, the court's holding can only be interpreted as a policy *against* rewarding contributions of a technological nature. The District Court by its holding has told American corporations that they are free to ignore the rights of their employee inventors.

The issues presented in this case deal with the fundamental components of the American system of technological advancement. The public importance of the issues involved and their resolution by this Court should motivate the exercise of this Court's jurisdiction. At a time when American's technological leadership is being, or has been, overtaken, there is simply no more important issue to the well-being of the country.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

J. RODMAN STEELE, JR.
STEELE, GOULD & FRIED
3232 IVB Building
1700 Market Street
Philadelphia, Pennsylvania 19103
Attorneys for Petitioner

Of Counsel:

ROBERT TAYLOR
WAY, WAY & TAYLOR
115 East Wildwood Avenue
Wildwood, New Jersey 08260

Dated: September 2, 1983

APPENDIX

PETITION DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-5264

JOHN C. HARDEN,

Plaintiff-Appellant

v.

E.I. DuPONT DE NEMOURS & CO.,

Defendant-Appellee

SUR PETITION FOR REHEARING

Present ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*

The petition for rehearing filed by APPELLANT in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service

Petition Denying Rehearing

not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ James Hunter, III
Judge

Dated: June 7, 1983

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-5264

JOHN C. HARDEN,

Appellant

v.

E.I. duPONT de NEMOURS & COMPANY

Appeal from the United States District Court for the District of New Jersey — Camden (D.C. Civil Action No. 79-0931)
District Judge: Honorable Stanley S. Brotman

Argued April 26, 1983

Before HUNTER and HIGGINBOTHAM, *Circuit Judge*, and STAPLETON,* *District Judge*

JUDGMENT ORDER

John C. Harden appeals from the district court's order granting defendant's motion for summary judgment. He asserts that the district court erred in granting the motion because there were material facts in dispute regarding:

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* Honorable Walter K. Stapleton, United States District Judge for the District of Delaware, sitting by designation.

1) the accrual and application of the proper statute of limitations under Delaware or New Jersey law; and

2) the wrongful termination of appellant under an existing employment agreement.

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

s/ James Hunter, III
Circuit Judge

Attest:

s/ Sally Mrvos
Clerk

Dated: May 12, 1983

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED JANUARY 26, 1982

Civil Action No. 79-931

JOHN C. HARDEN,

Plaintiff,

v.

E.I. DuPONT DE NEMOURS & COMPANY,

Defendant.

APPEARANCES:

Way, Way, Goodkin & Taylor
115 East Wildwood Avenue
Wildwood, New Jersey 08260
and
J. Rodman Steele, Jr., Esquire
Steele, Gould & Fried
3232 IVB Building
1700 Market Street
Philadelphia, Pennsylvania 19103
Attorneys for Plaintiff

Thomas L. Morrissey, Esquire
Rosemary J. Bruno, Esquire
Carpenter, Bennett & Morrissey
744 Broad Street
Newark, New Jersey 07102
Attorneys for Defendant

Opinion and Order Filed January 26, 1982

BROTMAN, District Judge

This is a diversity suit in which plaintiff, John Harden, seeks damages based on incidents arising out of his employment by defendant E.I. du Pont de Nemours and Company (Du Pont), which lasted more than thirty-five years. Mr. Harden brought this lawsuit, framed in eight counts, in part alleging that Du Pont failed to compensate him adequately for his innovations, improperly appropriated his inventions, and fraudulently induced him to apply his efforts to Du Pont's benefit by misrepresenting to him that he would receive awards for significant contributions to the company. These allegations are the substance of the seven counts which were the subject of the court's opinion and order of September 10, 1981, granting partial summary judgment to the defendant. This court held that counts one through six and count eight were barred by the statute of limitations and by the doctrine of laches.

The case is currently before the court on plaintiff's motion for reconsideration of that judgment and, in the alternative, for an order certifying for appeal the questions raised by that judgment; and on defendant's motion for summary judgment on the remaining count of the complaint. This is count seven, in which it is alleged:

> 67. In March, 1978, duPont, contrary to due process of law and in breach of Harden's employment agreement, fired Harden, notwithstanding his many years of invaluable contributions to the company.

(Complaint, ¶67). The court will first discuss the defendant's motion for partial summary judgment.

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Because the termination occurred while plaintiff was working and residing in New Jersey, the court will apply the law of New Jersey. Plaintiff's residence and employment in the state give New Jersey "a substantial interest in applying its own" limitations period. *Draper v. Airco, Inc.*, 580 F.2d 91, 99 (3rd Cir. 1978) (*See* Opinion of September 10, 1981, pp. 3-5). Plaintiff has sought to have the law of New Jersey applied on this motion. Defendant states in its briefs that it would be entitled to summary judgment under the law of either New Jersey or Delaware.

The standard for summary judgment is a stringent one. Summary judgment may only be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Moreover,

> When considering a summary judgment motion, "[i]nferences to be drawn from the underlying facts contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing the motion. The non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt."

Special Jet Services, Inc. v. Federal Ins. Co., 643 F.2d 977, 980 (3rd Cir. 1981), *quoting, Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). In brief, summary judgment is not designed to provide an easy method for the resolution of factual issues; rather, it is a means

to allow the resolution of cases in which there are no genuine issues of material fact. *See Manetas v. International Petroleum Carriers, Inc.*, 541 F.2d 408 (3rd Cir. 1976).

In November of 1952, the plaintiff executed a document, styled an "Employees' Agreement," which required him to assign any patents which he may gain during his employment to Du Pont ". . . in consideration of and as part of the terms of the employment or continuation of employment (as the case may be) of the Employee by the Employer, at a wage or salary and for such length of time as shall be mutually agreeable. . . ." (A copy of the contract is appended to this opinion as Exhibit A). Plaintiff does not posit the existence of any other agreements dealing with the duration of his employment, and, accordingly, it must be held that Hardin's contract with Du Pont was for an indefinite term and, as such, was terminable at will. *English v. College of Medicine and Dentistry of N.J.*, 73 N.J. 20, 23 (1977); *Jorgensen v. Pennsylvania R.R. Co.*, 25 N.J. 541, 554, 559 (1958); *Schlenk v. Lehigh Valley Railroad Co.*, 1 N.J. 131, 135 (1948); *Hogan v. Bergen Brunswig Corp.*, 153 N.J. Super. 37, 42 (1977). Plaintiff's argument that he may not be bound to the agreement because there was no consideration supplied by Du Pont is unavailing for two reasons. The first is that Du Pont's decision to continue to employ Mr. Hardin after the signing of the agreement is itself consideration. *Hogan v. Bergen Brunswig Corp., supra,* 153 N.J. Super. at 43. Further, the asserted invalidity of the agreement would not change the fact that Hardin's employment could be terminated at will.

The courts of New Jersey have recently recognized an exception to the rule that an employee could be fired entirely at the will of his or her employer. It has been held ". . . that an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy." *Pierce*

v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72 (1980). Modern rules limiting the power of employers to discharge their employees at will and with impunity have been recognized in a number of jurisdictions, *see Pierce, supra,* at 65-71; Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816 (1980), and the scope of the limits on an employer's whim has varied among those jurisdictions.

In *Monge v. Beebe Rubber Company,* 316 A.2d 549 (N.H. 1974), Supreme Court of New Hampshire stated: "We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good and constitutes a breach of the employment contract." *Id.*, at 551. Plaintiff's cause of action was sustained when she contended that she was fired because she refused to requite the affections of her foreman. *Id.*, at 550. More recently the same court said of *Monge,* "We construe *Monge* to apply only to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn." *Howard v. Dorr Wooley Co.*, 414 A.2d 1273, 1274 (N.H. 1980). This limitation of the scope of the cause of action for wrongful discharge brought that jurisdiction's law into harmony with that of New Jersey and most of the other jurisdictions which have recognized exceptions to the right of an employer to terminate an employee for any reason at all. *See* Note, Is the Public Policy Exception to the At Will Doctrine a Bad Omen for the Employment Relationship?, 33 Rutgers Law Review 1187, 1191 (1981). In order to maintain a cause of action for wrongful discharge, it is not appropriate to inquire into the good or bad faith or an employer. Rather, more than bad faith is required. It must be shown by the plaintiff

that the discharge was motivated by "a purpose which is contrary to a clear mandate of public policy." *Pierce, supra,* at 72.

At oral argument, defendant argued that the discharge of plaintiff was motivated by defendant's alleged conversion of property belonging to Du Pont. Nevertheless, the court can assume for purposes of this motion that Du Pont fired Hardin because it wished to defeat his efforts to gain the recompense which he felt was due him in return for his substantial contributions to the company. This is the substance of the complaint, and of much of the affidavit of Mr. Hardin submitted in support of this motion. Inasmuch as this assumption is the one which is more favorable to the party opposing the motion for summary judgment, *see Goodman v. Mead-Johnson Co., supra,* it is the one in which the court indulges for the purposes of this motion. Giving the plaintiff the benefit of this assumption, the court is still constrained to grant summary judgment to the defendant on count seven of the plaintiff's complaint.

Pierce, supra, holds that a cause of action for wrongful discharge may be maintained when the discharge contravenes public policy. "The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions." *Pierce, supra,* at 72. Except for the case of *Fortune v. National Cash Register Company, infra,* to be discussed below, plaintiff cites no cases which sustain a cause of action for wrongful discharge when the discharge is alleged to be in retaliation for actions taken by the employee which were designed to advance the employee's private interests and which did not otherwise advance the public interest. In *Lally v. Copygraphics,* 85 N.J. 668 (1980) the discharge complained of was alleged to be itself in violation of a criminal statute of New Jersey. *See also, Perks v. Firestone Tire & Rubber Co.,* 611 F.2d 1363 (3rd Cir. 1979) (termination violated Pennsylvania statute).

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The case of *Williams v. Civil Service Commission*, 66 N.J. 152 (1974) points to the constitutional protections of freedom of speech as one source of protection against discharge without cause. *Id.*, at 157-58. The case of *O'Sullivan v. Mallon*, 160 N.J. Super. 416 (Law Div. 1978), upheld a cause of action where a plaintiff was fired for refusing to administer medical treatments illegally. There the court discussed the importance of the public interest in being able to rely on the efficacy of legal limits imposed on medical practitioners. *Id.*, at 418. It is clear that the interest of the public in upholding these limits transcends any private arrangements which may exist in the context of employment of medical personnel. In our own case, the dispute between Hardin and Du Pont is essentially a private one, and the termination may be considered to be in retaliation for the assertion of interests which are largely devoid of public import. It is for this reason that plaintiff's reliance on *Pierce, supra*, 84 N.J. 58, is misplaced.

Plaintiff relies on *Fortune v. National Cash Register Company*, 364 N.E.2d 1251 (Mass. 1977), and argues that the New Jersey Supreme Court approved of this case and considered it as a basis for adopting its own rule in *Pierce*. It is clear that not all of the cases listed in *Pierce* were cited with approval, given the fact that many of those cases conflicted with the ultimate holding in *Pierce*, and with one another. *See Pierce, supra*, at 69-70. In *Fortune, supra*, the jury was permitted to inquire into the good or bad faith of the employer, without being required to consider the public policy implications of the termination of the employment relationship at hand. In that case, as in the instant one, the employee alleged that he was fired because the employer wishes to prevent the employee from gaining benefits which he had already earned. The employee in that case was a salesman, and the firing was alleged to have prevented plaintiff from gaining his commissions. *Id.*, at 1256. Nevertheless, the case does not

support the contention that a plaintiff discharged under such circumstances may gain recompense for earnings which might have been gained in the future had the employment relationship continued. Plaintiff's damages were limited to those which he sought as a result of services which he rendered prior to his termination. *Id.*, at 1253. These are properly the subject of a different cause of action, not enforceable as a result of the allegedly wrongful discharge itself.

The court has considered the affidavit and the briefs submitted in support of plaintiff's motion for reconsideration of its grant of summary judgment on the other seven counts of the complaint. The affidavit presents no new arguments or materials which were not considered previously and discussed in the opinion of September 10, 1981. Plaintiff's motion for reconsideration will be denied. The motion for an order certifying certain questions for appeal need not be reached, inasmuch as the ruling on count seven disposes of the whole of plaintiff's claim, and in light of the new procedural posture presented by the resolution of the motion for summary judgment on count seven. The court will consider *sua sponte* whether it has jurisdiction over the counterclaim entered by Du Pont, and whether it should exercise such jurisdiction if it may be found. The return date for that hearing is set for February 19, 1982, with briefs due ten days prior thereto.

s/ Stanley S. Brotman
United States District Judge

Dated: January 26, 1982

Opinion and Order Filed January 26, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 79-931

JOHN C. HARDEN,

Plaintiff,

v.

E.I. DuPONT DE NEMOURS & COMPANY,

Defendant.

This matter having been brought before the court on the 5th day of March, 1982; and

The court having granted summary judgment on all counts of the claim of the plaintiff, but having taken no action on the counterclaim of the defendant; and

There being no just reason for delay in entering final judgment as to the claim of the plaintiff; and

The court having considered the record, the briefs, and the correspondence of counsel; and

For the reasons stated in the court's opinion that day,

It is on this 8th day of March, 1982, hereby ORDERED that:

1. Final judgment be entered on the claim of the plaintiff, and as to all of the counts thereof (Fed. R. Civ. P. 54(b)); and

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2. A stay be entered as to all proceedings in the counterclaim of the defendant during the pendency of any appeal which may be taken from the judgment entered herein.

No costs.

s/ Stanley S. Brotman
United States District Judge

Filed Mar. 15, 1982
Angelo W. Locasio
Clerk

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED SEPTEMBER 10, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 79-931

JOHN C. HARDEN,

Plaintiff,

v.

E.I. DuPONT DE NEMOURS & COMPANY,

Defendant.

APPEARANCES:

Way, Way, Goodkin & Taylor
115 East Wildwood Avenue
Wildwood, New Jersey 08260
and
J. Rodman Steele, Jr., Esquire
Steele, Gould & Fried
3232 IVB Building
1700 Market Street
Philadelphia, Pennsylvania 19103
Attorneys for Plaintiff

Thomas L. Morrissey, Esquire
Rosemary J. Bruno, Esquire
Carpenter, Bennett & Morrissey
744 Broad Street
Newark, New Jersey 07102
Attorneys for Defendant

Opinion and Order Filed September 10, 1981

BROTMAN, District Judge

John C. Harden ("Harden") was the fourth generation of his family to work for E.I. DuPont de Nemours and Company ("DuPont"). He began working for DuPont in 1942, upon his graduation from high school, and remained in the company's employ, with the exception of several years' military service, until he was fired in 1978. In the context of the instant action, Harden's steadfastness is less important, perhaps, than certain other of his qualities — especially, intelligence and inventiveness. Despite his lack of an extensive formal education, Harden used his native abilities to develop various ideas and devices that proved to be of considerable benefit to his employer.[1] The instant action is based on Harden's claim that DuPont improperly appropriated his inventions and ideas and then refused to compensate him adequately for his efforts. Jurisdiction of the dispute is based on diversity of citizenship. 28 U.S.C. §1332.

The complaint is framed in eight counts, seven of which are relevant at this time. The first three counts allege that DuPont improperly refused to give Harden "A" bonus awards with respect to his contributions in the areas of differential thermal analysis, gas chromatography, and instrument sales, thereby violating his employment contract. Count four alleges that DuPont fraudulently induced Harden to enter into the employment contract by misrepresenting to him that he would receive awards for significant contributions to the company. Count five alleges that DuPont tortiously misrepresented various facts to prevent Harden from receiving awards he deserved, thereby interfering with his

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1. The parties hotly dispute the extent and value of Harden's contributions. We need not decide this issue, but, for purposes of the instant motion, we shall assume that Harden's contributions were significant.

prospective economic gain. Count six asserts that DuPont has been unjustly enriched at Harden's expense by taking the benefit of his innovations without properly compensating him. Finally, count eight alleges that DuPont's failure to give Harden "A" bonuses for his inventions renders his assignment of various patents to the company invalid for lack of consideration.[2] Thus, although it asserts theories of recovery based on contract, tort, and unjust enrichment, the complaint, insofar as it is at issue here, essentially concerns DuPont's alleged failure to compensate Harden adequately for his various inventions and ideas that benefitted the company.

Currently being considered by the court is DuPont's motion for summary judgment with respect to the seven counts of the complaint discussed above. DuPont makes two arguments in support of its motion. First, it argues that the employment agreement between Harden and the company gave the company exclusive rights with respect to Harden's work-related inventions and improvements and committed to the company's discretion whether to award Harden bonuses for his work. Second, DuPont contends that Harden's claims are time-barred by the applicable statute of limitations and, insofar as equitable claims are asserted, by the doctrine of laches.

The standard for summary judgment is a stringent one. Summary judgment may only be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled

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2. Count seven, which is not relevant at this time, alleges that Harden's employment with DuPont was wrongfully terminated.

to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Moreover,

> When considering a summary judgment motion, "[i]nferences to be drawn from the underlying facts contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing the motion. The non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt."

Special Jet Services Inc. v. Federal Ins. Co., 643 F.2d 977, 980 (3rd Cir. 1981), *quoting, Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). In brief, summary judgment is not designed to provide an easy method for the resolution of factual issues; rather, it is a means to allow the resolution of cases in which there are no genuine issues of material fact. *See Manetas v. International Petroleum Carriers, Inc.*, 541 F.2d 408 (3rd Cir. 1976).

Notwithstanding this stringent standard, we conclude that DuPont's motion should be granted. We take no position with respect to the import of the employment agreement because we find that Harden's claims are time-barred by the applicable statute of limitations and by the doctrine of laches. With respect to this question, there are no genuine issues of material fact, and summary judgment is warranted as a matter of law. Accordingly, defendant's motion will be granted.

I. CHOICE OF LAW

In a case such as this based on diversity jurisdiction, the Rules of Decision Act mandates that we apply the applicable state statute

of limitations. *See Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Gleason v. United States*, 458 F.2d 171, 174 (3rd Cir. 1972). Where there is a question as to which state's limitations period should be applied, the federal court uses the forum's choice of law rules to decide. *See Klaxon Co. v. Stentor Elec. Manuf. Co.*, 313 U.S. 487 (1941). Until 1973, New Jersey courts followed the traditional approach, which views statutes of limitation as "procedural," and invariably applied the forum's limitations period. *See, e.g., Marshall v. Geo. M. Brewster & Son, Inc.*, 37 N.J. 176 (1962). In *Heavner v. Uniroyal, Inc.*, 63 N.J. 130 (1973), the New Jersey courts abandoned that mechanical rule, and held as follows:

> when the cause of action arises in another state, the parties are all present in and amenable to the jurisdiction of that state, New Jersey has no substantial interest in the matter, the substantive law of the foreign state is to be applied, and its limitation period has expired at the time suit is commenced here, New Jersey will hold the suit barred. In essence, we will "borrow" the limitations law of the foreign state.

Id. at 141. *See O'Keefe v. Snyder*, 83 N.J. 478 (1980).[3] The third circuit has interpreted *Heavner* to require that a New Jersey statute of limitations be applied "whenever New Jersey has a substantial interest in applying its own" limitations period. *Draper v. Airco, Inc.*, 580 F.2d 91, 99 (3rd Cir. 1978). However, when there is no such substantial interest, the court must balance the factors enumerated in *Heavner* to determine which state's statute applies.

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3. Contrary to plaintiff, we do not read *O'Keefe* as in any way limiting or representing a departure from *Heavner*. Accordingly, the circuit court's opinions interpreting *Heavner* continue to reflect accurately New Jersey law.

Id. See Allen v. Volkswagen of Am., Inc., 555 F.2d 361 (3rd Cir. 1977).

Under the circumstances of the instant case, the question of which state's statute of limitations applies depends on when plaintiff's cause of action accrued. Until 1976, plaintiff lived and worked in Delaware. All of the inventions and ideas underlying this action date from the late 1950's and early 1960's, when New Jersey had no significant interest in the relation between plaintiff and his employer. Thus, if the cause of action accrued prior to 1976, New Jersey's interests would be negligible and the factors enumerated in *Heavner* would clearly mandate the application of Delaware law. During 1976, however, plaintiff moved to New Jersey and began working at a DuPont facility in this State. We think it apparent that New Jersey has a substantial interest in protecting the rights of its resident employees. Hence, if plaintiff's cause of action accrued subsequent to 1976, the New Jersey statute of limitations would govern. Because we find that plaintiff's cause of action accrued no later than 1970, we conclude that the Delaware statute of limitations governs.

II. ACCRUAL OF THE CAUSE OF ACTION

Under Delaware law "the cause of action is deemed to have accrued at the time of the commission of the tort or the breach of the contract." *Rudgniski v. Pullella*, 378 A.2d 646, 648 (Del. Super. 1977). *See Isaacson, Stolper & Co. v. Artisan's Savings Bank*, 330 A.2d 130 (Del. 1974). In the instant case, the nub of plaintiff's various claims for relief is that he was improperly denied "A" bonuses for his invention and innovative ideas. Thus, the critical date is when he was informed by DuPont that the "A" bonus requests submitted by him or on his behalf had been denied. *Cf. Delaware State College v. Ricks*, 101 S. Ct. 498 (1980);

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Department of Labor ex rel. Commons v. Green Giant Co., 394 A.2d 753 (Del. Super. 1978). It was this allegedly improper rejection of plaintiff's bonus requests that triggered his claims, whether predicated on tort, contract, or unjust enrichment. The exact date that plaintiff was informed of the "A" bonus rejection is not certain, but it is clear that this occurred, at the very latest, during 1970.[4] The complaint and plaintiff's deposition testimony confirm this fact. *See* Complaint at ¶¶19, 39-42; Deposition of J. Harden at pp. 4.140-.145 (2/27/81); 5.140-.143 (2/28/80). Accordingly, we find that plaintiff's causes of action predicated on DuPont's rejection of "A" bonus awards accrued as of the end of 1970 at the latest.[5]

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4. Plaintiff has indicated on some occasions that he was not informed of this decision until some time in 1972. *See* Affidavit of Plaintiff in Opposition to Summary Judgment Motion at ¶19 (1/23/81). Even if we were to accept this date, there would be no effect on our resolution of the instant motion.

5. This reasoning does not apply to Harden's claims with respect to his work in gas chromatography. Harden never applied for an "A" bonus with respect to his work in this field, nor was such a bonus request filed on his behalf. Hence, he was never turned down for such an award. There are two possible ways to view this situation, both of which lead to the same conclusion. First, one could conclude that Harden's cause of action has never accrued with respect to this aspect of his claim. Whether based on theories of contract, tort, or unjust enrichment, the essence of Harden's action is DuPont's allegedly wrongful refusal to award him "A" bonuses for his work. Thus, one could conclude that there can be no cause of action until there is such a refusal. The second, and we believe preferable, approach is to view DuPont's continued failure to award a bonus to Harden as the functional equivalent of a refusal. Harden's work in gas chromatography, for which he claims he should have been awarded an "A" bonus, was done in the 1950's. DuPont's failure to award Harden a bonus for that work was certainly actionable, if at all, by 1970, when Harden's other bonus requests were denied. Under either of these approaches, summary judgment is as appropriate with respect to the gas chromatography claim as it is with respect to the other two claims.

Plaintiff disputes this on several grounds. First, plaintiff argues that "DuPont's violation of Harden's rights under the Special Compensation ["A" bonus] Plan continues even now, Brief at p. 31, and that he has a continuing right to seek judicial relief. This argument is without merit. Although Harden may well continue to suffer the ill effects of DuPont's allegedly wrongful acts, the claimed violation of his rights occurred at the time the company rejected his request for an "A" bonus. *See Ricks, supra,* 101 S. Ct. at 503-04; *United Air Lines v. Evans,* 431 U.S. 553, 558 (1977); *Blake v. Town of Del. City,* 441 F. Supp. 1189, 1200 (D. Del. 1977). *Cf. Bolender v. Farm Bureau Mut. Ins. Co.,* 474 F.2d 1360, 1363 (3rd Cir. 1973); *Freedom v. Beneficial Corp.,* 406 F. Supp. 917 (D. Del. 1975). That happened no later than 1970. There is simply no basis for plaintiff's claim that this constitutes a continuing violation.

Second, plaintiff points to the fact that in 1977 a new request for an "A" bonus was submitted on his behalf and was denied. He contends that this later date should, therefore, mark the point his cause of action accrued. This argument, also, is without merit. The 1977 submission related to precisely the same inventions and contributions that DuPont had refused to give a bonus for in 1970. Moreover, there is no claim that any intervening facts occurred that would have given Harden any right to a bonus in 1977 that he did not possess in 1970. Under these circumstances, we conclude that once DuPont breached the contract between them (or tortiously interfered with plaintiff's rights) by allegedly improperly rejecting the 1970 bonus request the limitations period began to run. The fact that, in 1977, DuPont reaffirmed its position that Harden was not entitled to an "A" bonus for his contributions did not create a new cause of action as to which the limitations period would begin anew. To hold otherwise would mean that any breach of contract action reaccrues whenever the

breaching party confirms its intention not to honor the contract. This conclusion is untenable. DuPont's rejection of Harden's 1977 request was merely a reaffirmation of an alleged invasion of Harden's rights that occurred many years earlier. *See Sheeran v. General Elec. Co.*, 593 F.2d 93, 99-100 (9th Cir.), *cert. denied*, 444 U.S. 868 (1979). *Cf. Tilden v. Anstreicher*, 367 A.2d 632, 634 (Del. 1976). Nor was DuPont's consideration of the 1977 request a waiver of its statute of limitations defense. *See Windsor v. Hearn*, 161 A. 288, 291 (Del. 1932). *Cf. International Union of Elec., Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (invocation of grievance procedure does not toll statute of limitations for Title VII action).

Finally, Harden contends that he was repeatedly advised by his supervisors that they would continue to seek an award on his behalf and that the longer he waited the larger an award he might receive. These allegations, which we accept as true for purposes of this motion, are simply insufficient under Delaware law to constitute a waiver of the statute of limitations, fraudulent concealment, or some other basis for tolling the statute. *See Mitchell v. E.I. du Pont de Nemours & Co.*, 310 A.2d 641 (Del. 1973); *Windsor v. Hearn*, 161 A. 288 (Del. 1932); *City of Newark v. Edward H. Richardson Assoc.*, 375 A.2d 475 (Del. Super. 1977); *DiBiase v. A & D, Inc.*, 351 A.2d 865 (Del. Super. 1976); *Halpern v. Barran*, 313 A.2d 139 (Del. Ch. 1973). *Cf. Ricks, supra*, 101 S. Ct. at 505-06, 506 n.15 (1980) ("mere requests to reconsider, however, cannot extend the limitations period applicable to the civil rights laws"). Nor would the alleged facts bring the case under Delaware's limited "discovery rule." Plaintiff learned of the denial of the bonus requests no later than 1970, and his cause of action accrued at that time. *See Isaacson, Stolper & Co. v. Artisan's Savs. Bank*, 330 A.2d 130 (Del. 1974); *Lempert v. Gilmore*, 312 A.2d 335 (Del. Super. 1973).

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Given our finding that plaintiff's cause of action accrued in 1970 (or, indeed, even if we accept 1972 as the date), it becomes unnecessary to decide which statute of limitations is applicable. Whether the one year limitation period of 10 Del. C. §8111 or the three year period of 10 Del. C. §8106 applies, plaintiff's claims are time-barred. Indeed, plaintiff's claims would be untimely even under New Jersey's more generous limitations period of six years. N.J.S.A. 2A:14-1.

III. LACHES

In large part for the reasons expressed above, we hold that plaintiff's claims, to the extent they are equitable in nature, are barred by the doctrine of laches. Delaware follows the general rule that the applicability of laches is governed, to a significant extent, by the analogous statute of limitations. *Vredenburgh v. Jones*, 349 A.2d 22, 36 (Del. Ch. 1975); *Hutchinson v. Fish Engineering Corp.*, 203 A.2d 53, 63 (Del. Ch. 1964), *aff'd*, 213 A.2d 447 (Del. 1965). *See Gruca v. United States Steel Corp.*, 495 F.2d 1252, 1258-59 (3rd Cir. 1974). Plaintiff raises two arguments why his equitable claims should not be barred: first, he contends that fear that he might lose his job prevented him from bringing this action earlier; and second, he argues that DuPont was responsible for his delay in instituting suit in that his superiors repeatedly indicated they would continue to seek a bonus for him. We accept plaintiff's factual allegations for purposes of this motion, but we find neither argument persuasive. Certainly, where a defendant has actively hindered the institution of a suit, it may be inequitable to find the action barred by laches. *See Cool v. International Shoe Co.*, 142 F.2d 318 (8th Cir. 1944). However, plaintiff's allegations simply do not rise to that level. In short, the fact that plaintiff's supervisors indicated that they would resubmit bonus requests on his behalf is far short of the

type of hindrance necessary to avoid the application of laches. Even if we were to infer that plaintiff's supervisors acted with the desire to avoid a possible lawsuit, their statements would not constitute the type of interference with plaintiff's claim that must be shown. Thus, we conclude that plaintiff's equitable claims are barred by laches.

For the reasons indicated above, defendant's motion for partial summary judgment will be granted. An appropriate order will be entered.

s/ Stanley S. Brotman
United States District Judge

Dated: September 10, 1981

Opinion and Order Filed September 10, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 79-931

JOHN C. HARDEN,

Plaintiff,

v.

E.I. DuPONT DE NEMOURS & COMPANY,

Defendant.

This matter having been brought before the court on the 20th day of March, 1981; and

The court having considered the briefs, affidavits, and oral argument of counsel; and

For the reasons stated in the court's opinion filed this date,

It is on this 10th day of September, 1981, hereby ORDERED that the motion of defendant, E.I. DuPont de Nemours & Co., for partial summary judgment is granted, and the claims asserted in counts 1, 2, 3, 4, 5, 6, and 8 of the complaint are dismissed.

No costs.

s/ Stanley S. Brotman
United States District Judge